SUPREME COURT OF INDIA

Messrs Noble Synthetics Limited

Vs

Collector of Central Excise, Bombay

Appeal (Civil) 7103 of 1999

(S.N.Variava and Dr.A.R.Lakshmanan)

17/03/2005

JUDGMENT

DR. AR. LAKSHMANAN, J.

The above appeal was filed against the final order No. 821/99-C dated 17.08.1999 passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (hereinafter called "the Tribunal") in Appeal No. E/4487/93-C.

The appellants are a small-scale unit engaged in the manufacture of various grades of acrylic polymers, namely, Synocure 867S, Synocure 823S, Synocure 862X and Synocure 868. The appellants had filed three classification lists bearing No. 1/90- 91 dated 03.04.1990, 4/90-91 dated 10.04.1990 and 6/90-91 dated 05.06.1990 respectively classifying the aforesaid products as acrylic polymers in primary form under Chapter Sub-heading 3906.90 of the first schedule to the Central Excise Tariff Act, 1985 claiming concessional rate of duty @ 40% ad valorem in terms of Sr. No. 42 of the schedule to the notification No. 53/88 dated 01.03.1988. The appellants, vide their letter dated 11.10.1990, addressed to the Assistant Collector submitted that there was a clerical error in filing the aforesaid classification lists and the correct rate of duty should have been @ 20% ad valorem in terms of Sr. No. 9 of the schedule to the notification No. 53/88 dated 01.03.1988. The appellants also filed a revised classification list No. 9/90-91 dated 17.10.1990 in respect of the above products. In the revised classification list Sr. No. 9 to the notification 53/88 dated 01.03.1988 was claimed contending that the products are emulsions.

The revised classification list filed by the appellants on 17.10.1990 was approved by the

jurisdictional Assistant Collector on 25.10.1990 i.e. within a period of 8 days. The appellants declared the above products as emulsions in their revised classification list with intent to avail the lower concessional rate of duty @ 20% ad valorem.

A show-cause notice dated 03.01.1992 was issued to the appellants alleging that the revised classification list was not in accordance with the circumstances as stated in Rule 173 B (4) of the Central Excise Rules, 1944. The show-cause notice alleged collusion between the Assistant Collector, who approved the revised classification list on 25.10.1990 and the appellants. The show-cause notice further proposed to demand a differential duty of Rs. 9, 95, 928/- for the period 27.10.1990 to 04.12.1991 by invoking the extended period of limitation under proviso to Section 11A of the Central Excise Act, 1944. A proposal was also made to confiscate the land, building, plant and machinery under Rule 173 Q (2) of the Rules.

The Collector of Central Excise, Bombay-III adjudicated the show-cause notice vide order dated 19.05.1993 confirming the demand of Rs. 9, 95, 928/- and a penalty of Rs. 10 lacs. The building, land, plant and machinery were also confiscated with an option to redeem the same on payment of Rs. 5 lacs. Being aggrieved by the order of the Collector of Central Excise, the appellants filed an appeal before the Tribunal, which disposed of the said appeal vide its final order dated 17.08.1999 modifying the impugned order in original to the extent of reduction of penalty from Rs. 10 lacs to Rs. 5 lacs. Being aggrieved by the above order of the Tribunal, the appellants have filed the present civil appeal before this Court.

We heard Mr. Rajiv Dutta, learned senior counsel appearing for the appellant and Mr. R. Venkataramani, learned senior counsel appearing for the sole respondent. We have also perused the orders passed by the authorities and also of the Tribunal, opinion of the experts and the enclosures filed along with the appeal. Mr. Rajiv Dutta, leaned senior counsel appearing for the appellant, invited our attention to the relevant pleadings and the orders impugned in this appeal made the following submissions:- a) In the course of the proceedings before the Collector of Central Excise, the appellant had produced the technical opinions of Professors of the Indian Institute of Technology, Bombay and the Department of Chemical Technology, University of Bombay.

The Collector had behind the back of the appellant forwarded these opinions to the Deputy Chief Chemist of the Central Excise Collectorate for his opinion and also requested certain tests to be carried out on the samples of the appellant's products, reports of which were required to be submitted to the Collector. In pursuance of this request, the Deputy Chief Chemist carried out certain tests on the appellant's products and forwarded his report to the Collector under his letter dated 13.03.1992 and also submitted his opinion on the technical opinions produced by the appellant. According to learned senior counsel, the appellant was kept in the dark of the test results of the products and also of the opinion of the Deputy Chief Chemist on the technical aspect, right through the proceedings before the Collector. It was only when the matter came up before the Tribunal in appeal, the Tribunal suo motu directed the Department to produce the test reports of the appellant's products in its order dated 08.02.1999. Thereafter, the Department filed copies of its reports, inspection of which was given to the appellant's in August, 1999;

b) On taking inspection, the appellant's were shocked to see for the first time that:

i. The Collector, as borne out by his letter No. F.V/Adj(15) SCN-205/91/B.III dated 20.7.1992 had submitted the expert opinions filed by the Appellant to the Deputy Chief Chemist for his opinion and requested for the test results of the Appellant's products, which fact was suppressed from the

Appellant at all material times.

ii. In pursuance of this request the Deputy Chief Chemist by his letter dated 13th March, 1992 addressed to the Collector had submitted his results and also had rebutted the technical opinions produced by the appellant, which fact too has been suppressed from the appellant at all material times.

iii That the Collector has followed the findings of the Deputy Chief Chemist in his order dated 19.5.1993 and held against the appellant.

iv. The action of the Department in suppressing the test results of the appellant's products is also in direct breach of the provisions of Rule 56 of the Central Excise Rules whereunder the Department is bound to communicate the results of all tests to the manufacturer and the manufacturer has the right to request for a re-test within 90 days. As these test reports were never communicated by the Collector to the appellant they have been denied their statutory right of a re-test as provided by the said Rules.

c) The appellant on becoming aware of the aforesaid facts filed their affidavit dated 14.08.1999 placing these facts on record and requested the Tribunal to set aside the order of the Collector as being in breach of the principles of natural justice and of Rule 56. A hearing was held before the Tribunal on 17.08.1999 when relevant submissions were made in that behalf. The Tribunal, however, by its impugned order brushed aside the preliminary contention of the appellant by observing as follows:

"We are inclined to agree with the learned SDR that non-supply of test report; which is adverse to the appellants, has not been referred to in the Show Cause Notice and which has not been relied upon by the adjudicating authority in arriving at its findings, does not lead to violation of any principles of natural justice." *

d) That the said order amounts to grave travesty of justice and is grossly unconscionable and that the test reports could not have been referred to in the show-cause notice as the show-cause notice has been issued earlier on 03.01.1992 while the request by the Collector to the Deputy Chief Chemist was made later as borne out by letter dated 20.07.1992 of the Collector;

e) That the principles of natural justice require a complete disclosure of all evidence on record to the assessee and the impugned order is clearly in breach of the principles of natural justice and has denied the appellant their right to a fair hearing;

f) Once an adjudicating authority refers certain evidence produced by the assessee for the technical opinion of the Deputy Chief Chemist of the Department, he is bound by the principles of natural justice to furnish the Deputy Chief Chemist's report to the assessee. The assessee would then have an opportunity to rebut the Department's evidence;

g)The proceedings before the Collector are quasi judicial in nature. A complete disclosure of all material before the Collector has to be made to the assessee who is entitled to notice of the same and no evidence can be sought to be collected behind the back of a party as the same results in a denial of a fair hearing;

h) The impugned order is also bad on merits as it totally ignores and fails to appreciate that the products manufactured by the appellant are of highly technical nature and that the commercial

parlance test would not apply in the given case;

i) The opinion of the Deputy Chief Chemist in respect of the technical opinion as well as the test report is adverse to the appellant, so also is the order passed by the Collector. The said adverse evidence was admittedly before the Collector when he passed his order and the same was deliberately kept back from the appellant. It was submitted that the impugned order can create a totally wrong and dangerous precedent in law inasmuch as it seeks to permit an adjudicating officer to obtain vital evidence on the subject matter of a dispute and refuse to disclose it to the assessee simply by not referring to it specifically in the adjudication order. Moreover, it seeks to permit an adjudicating officer to obtain test results of the assesse's products behind his back and not reveal the same to them.

j) The impugned order is also in gross and direct breach of Rule 56 of the Central Excise Rules which embodies the principles of natural justice. Under Rule 56(2) the test results of all tests conducted are required to be communicated to the manufacturer and by virtue of Rule 56(4) where the manufacturer is aggrieved by the result of the test, he may within 90 days request for the samples to be re- tested. In the instant case, the appellant has been denied their statutory right of being informed of the test results and also of a request for a re-test;

k) On merits, it was submitted that the Tribunal failed to consider the appellant's submissions that the respondent erred in ignoring the overwhelming technical evidence, supporting the facts that the products in question is liable to duty as provided by Sl. No. 9 of the schedule to the Government of India Notification No. 53/88 dated 01.03.1988. The Tribunal also failed to consider that the Department had not produced an iota of technical evidence contrary to the experts opinion on the products. The Tribunal further failed to appreciate that collusion being a serious offence, the burden of proof should have been strictly discharged by the Department, which the Department has failed to do.

The learned counsel prayed to reverse the order passed by the Tribunal to the extent it dismisses the appellant's appeal.

Mr. R. Venkataramani, learned senior counsel for the sole respondent in reply to the arguments advanced by learned senior counsel for the appellant submitted that the order passed by the Tribunal dismissing the appeal filed by the appellant herein is in order and is unassailable and that it is legally permissible for the adjudicating authorities to make such enquiries as are necessary for adjudicating the case and thus it cannot be alleged the Collector had forwarded the opinion to the Deputy Chemist behind the back of the appellant's. He reiterated the other contentions raised before the lower authorities.

In the above background of facts, the issue in the present matter is whether the appellant's products fall under Sl. No. 9 or Sl. No 42 of Exemption Notification No. 53/88 dated 01.03.1988. The said entries are as follows:

Serial No.9

3905.10 or 3905.90 or 3906.90

Homopolymer and copolymer resin emulsions based on acrylic and/or vinyl monomers

20% ad valorem

Serial No. 42

39.01 to 39.15

All goods other than polyurethane's falling under Sub-heading No. 3909.60 waste parings and scrap of flexible polyurethane foam falling under heading No. 39.15 and polyvinyl chloride of paste grade or battery grade falling under heading No. 39.04

40% ad valorem

In the above case, the appellant's had produced technical opinions of Professors of I.I.T., Bombay and the Department of Chemical Technology, University of Bombay. Since the Collector required certain clarifications with regard to the above opinions, he forwarded the same to the Deputy Chemist for his opinion. The Collector also requested for tests to be carried out on the samples of the appellant's products seeking all the clarifications with regard to the opinions of professors without the knowledge of the appellant is challenged by the appellant as violative of principles of natural justice. In our view, seeking the views of the Deputy Chemist by any stretch of imagination cannot be a matter for finding fault with. There is nothing wrong in this. It is always legally permissible for the adjudicating authorities to make such enquiries as are necessary for adjudicating the case. Thus, it cannot be alleged that the Collector has forwarded the opinions to the Deputy Chemist behind the back of the appellant.

Pursuant to the above request, the Deputy Chemist carried out certain tests and forwarded his report to the Collector vide his letter dated 13.03.1992. In the said letter, it was indicated that the composition of ingredients used and process of manufacture given were different from what had been forwarded earlier to the laboratory along with the test memo. Since the products themselves were different and the report inconclusive, the adjudicating authority did not deem it fit to rely on the report or supply a copy of the test report on the samples sent to the chemical examiner. It is seen from the records that the Tribunal on its own directed the Department to produce the test report of the appellant's product vide order dated 08.02.1999. As the report given by the Chief Examiner has not been relied upon by the adjudicating authority in arriving at the findings, there is no violation of any principles of natural justice as has been rightly held by the Tribunal. This apart, there is no question of any suppression from the appellant since the test results of the Deputy Chief Chemist were not relied upon by the Department. The findings were absolutely independent of the test report. Therefore, it is futile to contend that there is breach of Rule 56. In our view, there is no breach of the said rule due to non-reliance by the Departments by the test report and, therefore, the

application of the above rule would be there only in case of reliance on the test report by the Department. It is also pointed out that, in any case, through out the proceedings of the case, the appellants have failed to submit any cogent evidence or arguments against the opinion of the Deputy Chief Chemist. The Tribunal has clearly clarified this point in its judgment. We, therefore, hold that the impugned order is not in violation of the principles of natural justice as alleged by the appellant.

It is also denied by the respondent that the opinion was not considered by the Tribunal which is clear from their statements relied by the Tribunal. On the other hand, the evidence relied upon by the adjudicating authority is based on the commercial parlance as the product is understood by the appellant's own technical experts from its production, planning and purchase departments and also by their customers. The Tribunal has, therefore, rightly rejected the technical opinion submitted by the appellants. Mr. Rajiv Dutta submitted that the revised classification list is based on clerical error in the old classification list. The arguments on the revised classification list cannot also be accepted. This submission is only an afterthought. Therefore, in our opinion, the Tribunal has rightly rejected the contentions of the appellant on principles of natural justice, non-supply of test report. We are also inclined to agree with the submission of learned senior counsel for the Department. The facts and circumstances as narrated in the records clearly go to show that there was an apparent collusion between the Assistant Collector and the appellant's. There was no substantial reason for the appellant to file the classification list on 17.10.1999 when they had already filed three classification lists and got the higher rate approved.

The Tribunal having regard to the overall facts and circumstances of the case was of the view that the penalty imposed is very harsh and, therefore, reduced the penalty from Rs. 10 lacs to Rs. 5 lacs. However, the Tribunal refused to interfere with the quantum of fine imposed on the appellant in view of the confiscation of the plant, machinery etc.

The findings of the Collector and of the Tribunal are based on merits of the case. The Department had discharged its onus to show that the product in question is acrylic polymer resin in primary form. We are also, therefore, satisfied that the products in question are not covered by sl. No. 9 of notification No. 53/88-CE but would be covered by sl. No. 42 of the schedule to the said notification. #

The appeal stands dismissed. No costs.